

LAI HIE HUA

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v.

LIM TEONG YU & ANOR

HIGH COURT SABAH & SARAWAK, SIBU

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HAMID SULTAN ABU BACKER JC

[CIVIL APPEAL NO: 12-15-2008]

24 NOVEMBER 2008

DAMAGES: *Appeal - Appeal against registrar's assessment - Road accident - Dependency claim - Special damages - Default judgment - Functus officio - Pain and suffering and loss of amenities - Loss of support - Whether appellate interference warranted*

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CIVIL LAW ACT: *Damages - Assessment of damages - Appeal against - Road accident - Dependency claim - Special damages - Default judgment - Functus officio - Pain and suffering and loss of amenities - Loss of support - Whether appellate interference warranted*

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This was an appeal by the plaintiff against the decision of the sessions judge in respect of quantum relating to assessment of damages. The plaintiff, the widow and administratrix of the deceased who died in a road accident, had filed this action for dependency and/or deceased's estate claim pursuant to ss. 7 and 8 of the Civil Law Act 1956 ('Act'). The memorandum of appeal, *inter alia*, stated that the sessions judge erred in law and in fact: (i) in deciding that the court's interlocutory judgment as to special damages was irregular and as such, that the sessions judge was entitled to revise the award without taking into consideration that the sessions court was *functus officio* insofar as the award of special damages was concerned; (ii) in failing to appreciate that the documentary evidence clearly showed that the deceased died three days after the accident, and the plaintiff was entitled to be compensated for pain and suffering and loss of amenities; and (iii) in failing to appreciate s. 7(3)(iv)(c) of the Act where the evidence of loss of support testified by the plaintiff was not challenged and ought to be accepted as good evidence on the quantum of loss of support.

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Held (dismissing the appeal):

(1) It is trite that special damages in law must be specifically pleaded and proved. In consequence, special damages cannot be a subject matter when default judgment is entered. If it was

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- A done so as in this case, it was not just irregular but illegal. Further, the argument of the appellant that the court was *functus officio* was misconceived. In this case, this court had ample jurisdiction to set aside the default judgment on the grounds of irregularity as well as illegality. However, this was
- B not necessary since the sessions judge had adequately dealt with the issues and made an order in respect of special damages, which was just and equitable taking into consideration the facts of this case. Furthermore, the concept of “*functus officio*” did not bar the sessions judge in dealing
- C with an administrative order such as a default judgment or interlocutory judgment. (para 6)
- (2) The appellant’s complaint on the issue of pain and suffering and loss of amenities had no merits. In this case, no medical
- D evidence was led. Further, the documents were all hearsay and the law on evidence did not even permit the court to consider this claim when evidence was not led according to law. (para 6)
- (3) In respect of loss of support, it was a finding of fact. The sessions judge had wide discretion to deal with the issue taking into consideration the local circumstance and the wages of the particular locality. In this case, there was no evidence
- E proved according to law as to the actual earnings of the deceased and just because the plaintiff’s evidence was not
- F challenged, it did not give the plaintiff a substantive right to assert that her evidence for loss of support must be accepted. From various cases in this area of law, the jurisprudence is that the court must exercise its judicial mind before assessing the quantum to be awarded for loss of support. (para 6)
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- (4) In the instant case, as the sessions judge had meticulously dealt with all the issues raised by the appellant in the said judgment there were no valid reasons for appellate interference. (para 6)
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Case(s) referred to:

Analby v. Praetorius 20 QBD 764 (*refd*)

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Berhad
[1998] 2 CLJ 75 FC (*refd*)

Bujang Hj Ulis v. Nancy Abdullah [2007] 8 CLJ 255 HC (*refd*)

I *Goh Chai Huat v. Lee Mui Ping & Ors* [2000] 4 CLJ 319 CA (*refd*)

The New India Assurance Co Ltd v. Karam Singh [1972] 1 LNS 155 (*refd*)

Lau Kung Kai v. Abu Serah Bol (M) [2008] 1 LNS 303 (*refd*)

Mahmod Kailan v. Goh Seng Choon & Anor [1976] 1 LNS 68 (**refd**) A
Tan Kuan Yau v. Suhindrimani Angasamy [1985] 1 CLJ 429; [1985] CLJ
(Rep) 323 FC (**refd**)
Tan Lin Siew & Anor v. Syed Hussein Alwi [1987] 2 CLJ 114; [1987] CLJ
(Rep) 362 SC (**refd**)

Legislation referred to: B

Civil Law Act 1956, ss. 7(3)(iv)(c), 8
Courts of Judicature Act 1964, ss. 32, 33, 34

For the appellant/plaintiff - Lim Heng Choo; M/s Lim & Lim
Respondents/defendants not present or represented C

Reported by Suresh Nathan

JUDGMENT D

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the appellant's/plaintiff's appeal against the decision of the learned sessions judge in respect of quantum relating to assessment of damages. The respondents/defendants were not present or represented here or the court below. E

Brief Facts

[2] The plaintiff who is the widow and administratrix of the deceased who died in a road accident has filed this action for dependency and/or deceased's estate claim pursuant to ss. 7 and 8 of Civil Law Act 1956. On 28 August 2007 in the absence of the defendants, though duly served with the summons, the plaintiff, without obtaining interlocutory judgment and an order for assessment of damages, proceeded to obtain judgment for special damages without trial and an order for assessment of general damages. The order reads as follows: F
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THE ACTION having this day been called on for hearing before Her Honour Puan Amelati Parnel in the presence of Ms Esther Wong of counsel standing in for Messrs Lim & Lim Advocates, advocates for the Plaintiff and the in the absence of and 2nd Defendant although duly served with the Summons herein IT IS THIS DAY ADJUDGED that the 1st and 2nd Defendants do jointly and severally pay the Plaintiff the special damages in the H
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- A sum of RM10,019.00 with interest thereon at the rate of 6% per annum from the date of accident ie, 3.10.2004 to date of judgment ie, 28.8.2007 and thereafter at 8% per annum till date of final judgment and that the general damages to be assessed.
- B [3] The Memorandum of Appeal *inter alia* says the learned session judge erred in law and fact: (i) in deciding that the courts interlocutory judgment as to special damages was irregular and as such, the learned sessions judge was entitled to revise the award without taking into consideration that the sessions court was *functus officio* insofar as the award of special damage was
- C concerned; (ii) in failing to appreciate that the documentary evidence clearly showed that the deceased died three days after the accident. The plaintiff was entitled to pain and suffering and loss of amenities. The learned judge in awarding RM3,500 for pain and suffering and loss of amenities failed to appreciate the decision
- D of *Goh Chai Huat v. Lee Mui Ping & Ors* [2000] 4 CLJ 319. As such, the said award of RM3,500 was grossly inadequate, unrealistic and not in accordance with the case authority; (iii) in failing to appreciate s. 7(3)(iv)(c) of the Civil Law Act 1956 where the evidence of loss of support testified by the plaintiff was not
- E challenged and ought to be accepted as good evidence on the quantum of loss of support. The basis for reduction of the loss of support was without merit as it was not mandatory that all the claim for loss of support must show evidence of living expenses as the provisions of the Civil Law Act 1956 only provide for living
- F expenses to be deducted if any. The court ought to accept the evidence of the plaintiff claiming RM850 per month which was given to her by the deceased and the said evidence was not disputed or challenged. The court's deduction of the loss of support to RM350 per month was unsupported by evidence
- G thereby occasioning a miscarriage of justice.

Plaintiff's Argument, 1st Ground

- H [4] In this case, the plaintiff has already obtained default judgment for special damages but the learned sessions judge during assessment of damages took the view that the default judgment was irregular and made some adjustments to special damages, the particulars of which in the pleadings reads as follows:

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**Particulars Of Special Damages Of The
Deceased's Estate**

(a) Legal fees for obtaining Letters of Administration	RM 700.00	A
(b) Damaged Pants	RM 50.00	B
(c) Damaged Shoes	RM 30.00	
(d) Damaged Helmet	RM 60.00	
(e) Damaged Shirts	RM 30.00	C
(f) Medical reports	RM 200.00	
(g) JPJ Search fee	RM 10.00	
(h) Police report charges	RM 164.00	D
(I) Cost of Casket	RM 1,650.00	
(j) Funeral Expenses	RM 7,005.00	
(k) Wife expenses for taking care of the deceased while being warded in Sibu Hospital for 3 days at RM40.00 x 3	RM 120.00	E
Total	RM10,019.00	

The learned sessions judge has given the reasons for the adjustment in the grounds of judgment and the relevant part reads as follows:

Firstly, in respect of the special damages (a), it was my view that the amount therein which had been awarded in the default judgment was irregular as the amount was entered without the items being assessed first. That is to say, the order of the judgment in default on 28/8/07 should be for interlocutory judgment to be entered and damages to be assessed. I say so because it would be unfair to the Defendants to pay for any amount under special damages at the mention date, without the court adjusting the figure if it was found to be not reasonable sum to be awarded. Further, it is my view that since there was no evidence shown on deceased's status in life in respect of funeral expenses (Anna Yong [1972] MLJ 103), it was my view that the amount ought to be adjusted. Hence, I have reduced the figure of RM10,019.00 to RM8,019.00 and with interest of 4% from date of accident to date of judgment ,and thereafter at 8% per annum till full payment. Except for the funeral expenses, I took the other items as reasonable expenses and loss suffered in the accident.

- A On this point the plaintiff says the learned sessions court judge had erred in law in that the sessions court was already *functus officio* in awarding the special damage of RM10,019 and as such the Sessions Court had no power of revision during the assessment of damages as the same was no longer an issue before the said
- B Sessions Court. And relies on the case of *The New India Assurance Co. Ltd. v. Karam Singh* [1972] 1 LNS 155, in particular two lines of the case in the submission as follows:

- C It is not clear how the words *functus officio* crept into the order appealed from. *Functus officio* means a person who has discharged his duty, or whose office of authority is at an end (See *Bed well v. Wood* [1877] 2 QBD 626.

- D And further relies on the case of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Berhad* [1998] 2 CLJ 75, where it was stated that it is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction.

- E And further, in reliance of an author of a text book who had stated that “regardless of whether a default judgment is regular or irregular a defendants’ resource is to have the default judgment set aside”. And in reliance with the said jurisprudence submits as follows:

- F It is not for the Sessions Court Judge to set aside or revise the default judgment but it is for the Respondent/Defendant to do so. There is no application by the Respondent/Defendant to set aside the default judgment and hence the learned Sessions Court Judge was wrong in law to act on his own to revise the special damages from RM10,019.00 to RM8,019.00. Regardless whether the
- G default judgment was regular or irregular, it is for the Respondent/Defendant to apply to set it aside and NOT the same Sessions Court to declare it irregular and acted on its own to revise the award of special damages.

- H [5] I do not wish to set out the plaintiff’s argument in respect of grounds 2 to 5 of the memorandum of appeal save to say that only the plaintiff gave evidence and the evidence was very brief and reads as follows:

PW1:

- I This is an I.C of my husband deceased husband. I also confirm these three documents, i.e. marriage certificate, death certificate and letter of administration.

Mr.Lim Tender 4 documents.

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CT : Exh.P. 1 – Photostat copy of decease I.C;

P.2 – marriage certificate;

P.3 Death certificate;

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P.4 – Letter of administration.

PW1 I confirm that my son's name is Hii Lu Long. This is the son from my late husband. I confirmed my husband was involved in accident on 3/10/04 and died on 6/10/04. My husband gave me RM850.00 per month.

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Mr. Lim : That's all. I will make my submission through my email."

[6] I have read the appeal record and the submission of appellant in detail. I take the view, that the appeal must be dismissed. My reasons are as follows:

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- (a) It is trite, special damages in law must be specifically pleaded and proved. (See *Tan Lin Siew & Anor v. Syed Hussein bin Alwi* [1987] 2 CLJ 114; [1987] CLJ (Rep) 362). In consequence, special damages cannot be a subject matter when default judgment is entered. If it was done so as in this case it is not just irregular but illegal. Solicitors entering into illegal orders when they ought not to do so and thereafter justifying that the said order ought not to be set aside, is abhorrent to notion of justice and fair play. In fact, I have dealt with such facts in the case of *Bujang Hj Ulis v. Nancy Abdullah* [2007] 8 CLJ 255, where I have stated that such an act may amount to contempt or subject matter of complaint to Advocates Disciplinary Board. That part of the judgment reads as follows:

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It is glaringly obvious that the claim against the 1st defendant is not a liquidated claim and in consequence a default judgment under Order 13 rule 1 of the RHC 1980 will not apply. In this case, the appellant has wrongfully and in breach of procedural rules, obtained a default judgment under Order 13 rule 1 of the RHC 1980 on the following terms: (a) the defendant transfers all her shares in the firm Zabare Motor Trading to the plaintiff; and (b) any transfer of all the defendant's shares or part thereof in the firm Zabare Motor Trading to any person or persons made between the dates of the trust 5 deed which is 25-05-01 and 1-01-05, if any, is null and void; and (c) costs.

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- A The default order the plaintiff has procured is not only a nullity but also illegal and need to be set aside upon the application of an aggrieved party as set out by the Federal Court in *Badiaddin bin Mohd Mohidin & Anor v. Arab-Malaysian Finance Berhad* [1998] 2 CLJ 75. In addition to
- B the principles enunciated in this case, in my view it must not be forgotten that civil courts are also conferred with supervisory jurisdiction in a limited sense to arrest any form of injustice on the court's own motion, pursuant to section 32 to 34 of CJA 1964, a point which is not necessary for me to elaborate on for the purpose of this case.
- C Notwithstanding the breach of procedural rules, the appellant without conceding submits in length to sustain the default judgment. This cannot be done as the plaintiff's claim is not a liquidated claim and in fact he is claiming discretionary relief. In consequence, the court cannot grant a default
- D order. Any solicitor, who knowingly procures a default order in blatant breach of the rules, in my view, will tantamount to have obtained the order in a manner which is inappropriate. Solicitors must not forget that they are officers of court and answerable to the court and any form
- E of irregular conduct may be seen as an act of contempt or subject matter of complaint to the Advocates Disciplinary Board by the courts as well as the aggrieved parties. In the event the solicitors have done in ignorance of the rules and resist the application to set aside, then it will be an appropriate case when the default judgment is set aside for
- F the learned Deputy Registrar to issue a notice to show cause why the solicitor's concern should not pay personally the costs of the application on a solicitor client basis to the applicant.
- G (b) Further, the argument of the appellant that the court is *functus officio* is misconceived, and the reliance on two sentences of the case of *The New India Assurance* is out of context for the learned judge in that case had also set out in what circumstances or facts the concept of *functus officio* will
- H apply and the relevant part of the judgment in the proper context reads as follows:
- I It is not clear how the words *functus officio* crept into the order appealed from. *Functus officio* means a person who has discharged his duty, or whose office of authority is at an end (see *Bedwell v. Wood* [1877] 2 QBD 626). Thus, once a president has convicted a person charged with an offence before him, he is *functus officio*, and cannot rescind the sentence and re-try the case. Similarly, once he has

tried a civil action and made an order on the final determination of the dispute between the parties, he is *functus officio* and cannot rescind his final order and re-try the case, or try a subsequent action between the same parties on the same subject matter. In the present case, the learned president became *functus officio* as regards the earlier action on his refusing the plaintiffs' application for its reinstatement, but he certainly did not become *functus officio* as regards the real dispute between the parties which he never tried, the issue between the parties being whether the plaintiffs were entitled to recover the money which they alleged they had paid to the defendant under a mistake of fact. In other words, he was not *functus officio* as regards that issue between the same parties in the second action. He was therefore wrong in dismissing the action.

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Further, I will add here that the concept of *functus officio* is not a fiat of Parliament or rule of procedure but a practice to stop issues which has been litigated, not to be reopened again and again. This practice was not intended to tie the hands of judges in respect of administrative rulings such as default judgments where no issues were lawfully ventilated. (See *Analby v. Praetorius* 20 QBD 764). My addendum is reflected in the judgment in the case of New India Assurance itself. In addition, the High Court has been given ample jurisdiction by the Courts of Judicature Act 1964 to ensure no injustice is passed by as a result of an order of the sub-ordinate court. This is reflected in s. 32 to s. 34 of the Act.

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- (c) In this case, I have ample jurisdiction to set aside the default judgment on the grounds of irregularity as well as illegality. However, I take the view that it is not necessary as the learned sessions judge has adequately dealt with the issues and made an order in respect of special damages, which I think is just and equitable taking into consideration the facts of this case. Further, the concept of '*functus officio*' does not bar the learned sessions judge in dealing with an administrative order, such as a default judgment or interlocutory judgment.

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- (d) The complaint of the appellant on the issue of pain and suffering and loss of amenities has no merits. In this case, no medical evidence was led. Further, the documents were all hearsay and the law on evidence does not even permit the court to consider this head of claim when evidence was not led according to law.

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- A (e) In respect of loss of support, I take the view it was a finding of fact. The learned sessions judge has wide discretion to deal with the issue taking into consideration the local circumstance and the wages of the particular locality. In this case there was no evidence proved according to law as to the actual earnings of the deceased. Just because the plaintiff's evidence is not challenged it does not give a substantive right for the plaintiff to assert that their evidence for loss of support must be accepted. From various cases in this area of law the jurisprudence is that the court must exercise its judicial mind before assessing the quantum to be awarded for loss of support. (See *Lau Kung Kai v. Abu Serah Bol (M)* [2008] 1 LNS 303; *Mahmod bin Kailan v. Goh Seng Choon & Anor* [1976] 1 LNS 68).
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- D (f) As a general rule the appellate court will not interfere with award of damages merely on the complaint that it is excessive, unless the amount arrived at was erroneous in that there was an omission on the part of the trial judge to consider some relevant materials, or had admitted for purposes of assessment some irrelevant considerations. (See *Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323). In the instance case the learned sessions judge has meticulously dealt with all the issues raised by the appellant in the said judgment. I do not see any valid reasons for appellate interference.
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[7] For reasons stated above, I dismiss the appeal with no order as to costs.

I hereby order so.

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